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KEEPING THE “BENEFIT” IN BENEFIT CORPORATIONS: HOW AND WHY NEW YORK STATE SHOULD CONTINUE TO FOSTER AND DEVELOP BENEFIT CORPORATION LEGISLATION

FRANK TANTONE*

INTRODUCTION

Imagine a corporation’s director leaning back in his chair as he meets with his fellow directors. As the chair reaches its apex, the director surveys the New York City skyline stretched across the windows. He begins discussing possible options for the corporation to pursue. Every option is met with pros and cons from his fellow directors, as they all attempt to carve out the next step for the corporation. They discuss the potential legal and social ramifications of each potential path that is proposed. While you may be thinking that this corporation is facing another traditional corporate decision, this specific corporation’s next decision may be more uniquely paramount than it first appears.

This corporation is not deciding whether to offer new stock options to its shareholders. In fact, it is not even deciding on a new way to maximize shareholder wealth at all. There are no hiring or firing decisions to be made in this meeting; no cunning ploys at achieving some sort of tax break; and no promotion of a new advertising campaign. Perhaps this corporation will provide more jobs to underemployed areas of the community; or maybe it will create sustainable energy. As a result, this corporation will

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create a public benefit by making a material positive impact on society.¹ This corporation is a benefit corporation.

A benefit is defined as both “an act of kindness” and “something that promotes well-being.”² New York has joined archetypal states like California and Delaware in incorporating more “benefits” into its business corporation laws—known as benefit corporation statutes.

New York recently adopted this exponentially growing national trend when the legislation was signed on December 12, 2011.³ The enactment of Business Corporation Law sections 1701-1709 came with high hopes for its success, demonstrated by former New York State Assembly Speaker Sheldon Silver, commenting that, “[t]his legislation demonstrates that profit and social responsibility are not mutually exclusive and that socially and environmentally-friendly business practices can enhance a company’s strength and profitability.”⁴ Indeed, these words were reinforced by the fact that fourteen companies took advantage of the new laws recognizing benefit corporations on the very first day that the statutes became effective in early 2012.⁵

This paper proposes that New York State should continue to facilitate the growth of benefit corporations through statutory amendments to its business corporation laws and recognition of important policy justifications behind these novel business models. In turn, these corporations will yield positive results, both economically and socially, in New York’s unique socio-economic landscape. Specifically, the inclusion of educational and cultural social good as acceptable pursuits of benefit corporations will result in more corporations tackling these issues.

¹ See N.Y. BUS. CORP. LAW § 1702 (McKinney 2012) (defining the essential terms of benefit corporation statutes).

² *Benefit definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/benefit>.

³ *New York State Authorizes Benefit Corporations*, STROOCK SPECIAL BULLETIN (Feb. 1, 2012), <http://www.stroock.com/SiteFiles/Pub1160.pdf>.

⁴ *Assembly Passes Legislation to Allow Benefit Corporations in New York*, ASSEMBLY SPEAKER SHELDON SILVER NEWS RELEASE (June 17, 2011), <http://assembly.state.ny.us/Press/20110617a/>.

⁵ Ed Litvak, *First New York Benefit Corps Created*, THE LO-DOWN (Feb. 13, 2012 at 12:45 PM), <http://www.thelodownny.com/leslog/2012/02/first-new-york-benefit-corps-created.html>; see also Haskell Murray, *How Many Benefit Corporations Have Been Formed?*, SOCENT LAW (July 23, 2013), <http://socentlaw.com/2013/07/how-many-benefit-corporations-have-been-formed/>.

This paper also examines the relevant policy justifications behind the continued support of benefit corporations, by way of the New York Business Corporation Laws (“NYBCL”). Because of the recent legislation, little scholarship has been written on benefit corporations, and their social and economic effects on New York specifically. The continued support of benefit corporations in New York will lead to economic and social prosperity, as well as increased encouragement of small businesses and start-up companies to become benefit corporations.

Part I of this Note serves as an extensive background of benefit corporation legislation. Specifically, Part I-A discusses the introduction of benefit corporations into the United States, along with their rapid growth. Part I-B addresses the main tenets of a “benefit corporation,” as they are designed in contemporary American state statutes. Part I-C and Part I-D draw distinctions between benefit corporations and traditional corporations and Certified B Corps, respectively. Lastly, Part I-E addresses the procedures for how, and the reasons why, a corporation would choose to become a benefit corporation. In this subsection, the Note examines both the process of establishing a corporation as a benefit corporation outright, along with the process of transitioning an existing corporation into a benefit corporation.

Next, Part II provides a description of a New York benefit corporation, and outlines the current state of benefit corporation legislation in New York State.

Part III addresses the statutory and policy concerns behind the current state of benefit corporation statutes in New York. First, it suggests an amended “definitions” provision of the NYBCL to coincide with similar legislation in other states, and to better serve the people of New York. In addition, this section will discuss both the social and economic policy justifications for further facilitating of benefit corporation growth in New York. The economic policies will be met by meeting customer expectations of corporate involvement within the community, such as job creation. New York will satisfy the social policies of fulfilling traditional corporate responsibility norms, as well as encouraging the creation of start-ups and small businesses. The social policy justifications of facilitating entrepreneurial ventures and fulfilling notions of traditional corporate responsibility will continue to be

the strongest policy behind benefit corporation statutes in New York.

I. BACKGROUND

A. *The Introduction of Benefit Corporation Legislation in the United States*

Maryland became the first state to enact benefit corporation legislation in 2010.⁶ Since then, there has been an upswing of benefit corporation proposals. As of 2014, 31 states have enacted such legislation, with several others proposing it to be passed in the near future.⁷

The rise of benefit corporation legislation in the United States has generated state-specific requirements of what it means to be a “benefit corporation.”⁸ Part of the rationale behind having state-specific benefit corporation legislation is that the enacting state’s statutes can be inserted into existing state corporation laws.⁹ As a result, the state’s existing corporations laws, along with these new and unique benefit corporation laws, may apply to benefit corporations.¹⁰ In short, it allows for a more seamless transition into having benefit corporations included into a certain state’s unique economic, legal, and social landscape.¹¹

⁶ Angus Loten, *With New Law Profits Take a Back Seat*, WALL STREET JOURNAL (Jan. 19, 2009), <http://online.wsj.com/news/articles/SB10001424052970203735304577168591470161630> (describing the enactment of New York’s benefit corporation laws).

⁷ *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Feb. 1, 2016) (listing that the states with currently proposed benefit corporation legislation as Hawaii, Kentucky, New Mexico, North Dakota, and Oklahoma).

⁸ *See How To Become a Benefit Corporation*, BENEFIT CORP., <http://benefitcorp.net/businesses/how-become-benefit-corporation> (outlining the differences in benefit corporation procedures in each state) (last visited Dec. 29, 2015).

⁹ William H. Clark, et. al., *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public*, <http://benefitcorp.net/policymakers/benefit-corporation-white-paper>.

¹⁰ *Id.*

¹¹ *See id.*; see also N.Y. BUS. CORP. LAW § 1701(b) (McKinney 2012) (stating that the benefit corporation statutes do not displace existing statutes).

B. *What is a Benefit Corporation?*

Defined broadly, a benefit corporation is a classification of corporation, in which the entity voluntarily takes on the responsibility of meeting higher standards of corporate purpose, accountability, and transparency by adhering to its state's benefit corporation laws.¹² Specifically, all benefit corporations across the nation must fulfill three general, yet separately identified, requirements in order to obtain and maintain benefit corporation status.¹³ These requirements consist of: 1) creating a material positive impact on society and/or the environment; 2) expanding fiduciary responsibility to include consideration of non-financial interests when making decisions; and 3) producing annual reports of its overall social and environmental performance through utilization of a third-party measuring standard.¹⁴

Benefit corporations also have unique "right of action" features.¹⁵ Only shareholders and directors have a right of action, while third parties do not have such a right.¹⁶ In addition, if the benefit corporation is a subsidiary, owners with greater than five percent interest in the parent company automatically have a right of action.¹⁷ Such a right of action can be pursued as a result of a "violation of or failure to pursue or create general or specific public benefit," or a "violation of a duty or standard of conduct."¹⁸

Moreover, there are currently no tax breaks to incentivize corporations into identifying as a benefit corporation.¹⁹ There seems to be no potential tax breaks on the horizon either.²⁰

¹² See *FAQ*, BENEFIT CORP., <http://benefitcorp.net/faq> (last visited Dec. 29, 2015).

¹³ *Id*; Sven Eberlein, *Occupying the Future: Benefit Corporations Now Opening Shop in Six Other States*, DAILY KOS (Dec. 14, 2011, 2:07 PM), <http://www.dailykos.com/story/2011/12/14/1043152/-Occupying-the-Future-Benefit-Corporations-now-opening-shop-in-NY-six-other-states>.

¹⁴ *FAQ*, *supra* note 13.

¹⁵ See *What are the Requirements?*, BENEFIT CORP., <http://web.archive.org/web/20120110100210/http://www.benefitcorp.net/for-business/what-are-the-requirements>; see also *Right of Action definition*, THE LAW DICTIONARY, <http://thelawdictionary.org/right-of-action> (last visited Oct. 5, 2016) (defining "right of action" as "[t]he right to bring a suit; a legal right to maintain an action").

¹⁶ BENEFIT CORP., *supra* note 16.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *FAQ*, *supra* note 13 (explaining that benefit corporation status does not affect tax status; aside from corporate purpose, accountability, and transparency, "everything else . . . remains the same").

²⁰ *Id.*

Nevertheless, the main incentive for identifying as a benefit corporation continues to be the enhanced corporate purpose, accountability, and transparency that the corporation takes on—which both customers and clients have already responded positively to.²¹

Becoming legally recognized as a “benefit corporation” is largely state-specific. However, there are some common requirements in obtaining this designation throughout all states.²² For example, all states require the filing of necessary documentation or amendments to become recognized as a benefit corporation.²³ Also, all states require a threshold vote of shareholders for an existing entity wishing to transform into a benefit corporation.²⁴

C. *Benefit Corporations vs. Traditional Corporations*

It may seem sensible to assume that benefit corporation status must be different than a traditional corporation due to its recent emergence.²⁵ Notwithstanding, several important differences between the two exist.

Generally speaking, the traditional corporation model is not a sufficient framework for a benefit corporation because it does not properly allow a benefit corporation to recognize its social and environmental objectives, and it does not financially insulate directors so they can consider non-financial interests.²⁶ As previously mentioned, benefit corporation status administered by the state protects the corporation against shareholder derivative suits when the company is engaged in pursuing their social and environmental goals.²⁷ This differs greatly from the traditional corporate model, in which there is generally no such protection.²⁸ While the traditional model holds that the consideration of non-

²¹ Litvak, *supra* note 5.

²² See *How to Become a Benefit Corporation*, BENEFIT CORP., <http://benefitcorp.net/businesses/how-become-benefit-corporation> (last visited Dec. 29, 2015).

²³ *Id.*

²⁴ *Id.* (explaining that this threshold is likely to consist of a majority).

²⁵ BENEFIT CORP., *supra* note 8.

²⁶ See Clark, et al., *supra* note 10.

²⁷ *Id.* at 20 (stating that benefit corporations are protected against suits from third parties, such as shareholders) (last visited Dec. 29, 2015).

²⁸ See *id.* at 21-22.

shareholder interests is permissive, benefit corporation laws mandate such a consideration.²⁹

Perhaps most importantly, benefit corporation directors are afforded the unique responsibility of being held accountable through shareholders for failing to accomplish its stated public benefits.³⁰ While a traditional corporation can simply abandon altruistic policies when times get tough, a benefit corporation does not have the same luxury.³¹ Historically, traditional corporations have been held to a standard of “maximizing shareholder wealth.”³² Whereas shareholders in traditional corporations may sue directors for not carrying out their fiduciary duties, directors of benefit corporations are vulnerable to shareholder suits “for not carrying out the company’s social mission.”³³

D. Benefit Corporations vs. ‘B Corps’

Here lies an incredibly important, and in some ways fallible, distinction over what can easily be a misnomer for the “benefit corporation.” A benefit corporation and a Certified B Corp are often improperly interchanged.³⁴ Part of this confusion results from the lack of expertise in these novel corporate distinctions, and part of it comes from benefit corporation designations often being referred to as “B Corps” as shorthand.³⁵ Thus, this Note will refer to benefit corporations by its *full name*. While these two distinctions may have some things in common, they also differ in several important ways.³⁶ These major differences are most

²⁹ *Id.* at 17.

³⁰ See Shelly Alcorn, *Benefit Corporations: A New Formula for Social Change*, CTR. FOR ASS’N LEADERSHIP, https://www.asaecenter.org/resources/articles/an_magazine/2012/april-may/benefit-corporations-a-new-formula-for-social-change (last visited Dec. 29, 2015).

³¹ James Surowiecki, *Companies with Benefits*, THE NEW YORKER, Aug. 4, 2014, available at <http://www.newyorker.com/magazine/2014/08/04/companies-benefits> (last visited Dec. 29, 2015).

³² Karl M. Sjorgen, *The FairShare Model: Chapter Nine*, VCEXPERTS.COM (Apr. 6, 2015), <https://www.vcexperts.com/reference/encyclopedia/chapters/slug/the-fairshare-model-chapter-nine>.

³³ *Id.*

³⁴ *Benefit Corporation vs. Certified B Corp*, BENEFIT CORP., <http://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps> (last visited Jan. 8, 2016).

³⁵ *Id.*

³⁶ *Id.*

notably evident in the corporation's performance, support, and availability.³⁷

A Certified B Corp is a corporation that has received its designation by achieving a minimum verified score on what is referred to as the "B Impact Assessment."³⁸ A Certified B Corp must score 80 points out of a possible 200 under this assessment in order to be recognized as such and receive the bevy of services available to them through the B Lab.³⁹ The B Lab is an entity that provides Certified B Corps with support ranging from financial assistance to communal learning from other Certified B Corps.⁴⁰ The B Lab also facilitates the certification process with no legal process involved with the state of incorporation.⁴¹

Most notably, B Corps and benefit corporations both require the director to consider the business decisions' impact on both shareholders and stakeholders.⁴² These stakeholders could be workers, communities, and the environment.⁴³

The most glaring difference between the two is the requirement of benefit corporations to be legally recognized by the state of incorporation.⁴⁴ While a B-Corp must file an annual report of its pursuit and achievement of its social and environmental goals that is "verified, certified, or audited by a third party organization standard," legally recognized benefit corporations do not.⁴⁵ Lastly,

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Performance Requirements*, B CORPORATION.NET, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements> (last visited Jan. 10, 2016) (stating that a Certified B Corp must score 80 points out of a possible 200 in order to be recognized as such and receive the financial and communal assistance of the B-Lab).

⁴⁰ *Benefit Corporation vs. Certified B Corp*, BENEFIT CORP INFORMATION CENTER, <http://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps> (last visited Jan. 8, 2016).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (recognizing that benefit corporation status is administered by the state, with no "certification" requirement); *see also* Angus Loten, *With New Law Profits Take a Back Seat*, WALL STREET JOURNAL (Jan. 19, 2009), <http://online.wsj.com/news/articles/SB10001424052970203735304577168591470161630> (describing the enactment of New York's benefit corporation laws).

⁴⁵ William H. Clark, et. al., *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public*, <http://benefitcorp.net/policymakers/benefit-corporation-white-paper> (last visited Oct. 5, 2016).

while the B Lab offers financial and communal resources only for Certified B Corps, the lab creates model legislation for benefit corporation proposals.⁴⁶

E. How and Why Would a Corporation Choose to Become a Benefit Corporation?

In many states, incorporating as a benefit corporation involves only some minor tweaks to a normal incorporation filing with the state.⁴⁷ For example, in New York, the potential benefit corporation merely needs to: (1) declare benefit corporation status in the articles of incorporation; and (2) declare a corporate purpose to create a general public benefit.⁴⁸

By becoming a benefit corporation, the entity gives entrepreneurs, as well as investors, an additional choice when determining which classification is most suitable for the corporation's needs and the achievement of its objectives.⁴⁹ A corporation chooses to identify as a benefit corporation because of the increased public relations and sought-after corporate missions that many investors look for.⁵⁰ Benefit corporation designation, generally speaking, recognizes companies that use "the power of business to solve social and environmental problems."⁵¹ These potential resources could further lead to benefit corporations having a stronger upside in investors' eyes when compared to a

⁴⁶ *Benefit Corporation vs. Certified B Corp*, Benefit Corp Information Center, <http://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps> (last visited Jan. 8, 2016).

⁴⁷ See *New York Benefit Corporation How-To-Guide: Incorporating as a Benefit Corporation Step-by-Step*, BENEFITCORP.NET, 2-3, http://benefitcorp.net/sites/default/files/documents/New_York_Benefit_Corp_How-To_Guide.pdf (last visited Jan. 8, 2016).

⁴⁸ *Id.* at 3.

⁴⁹ *New York State Authorizes Benefit Corporations*, STROOCK SPECIAL BULLETIN (Feb. 1, 2012), <http://www.stroock.com/SiteFiles/Pub1160.pdf>.

⁵⁰ See Shelly Alcorn, *Benefit Corporations: A New Formula for Social Change*, CTR. FOR ASS'N LEADERSHIP, https://www.asaecenter.org/resources/articles/an_magazine/2012/april-may/benefit-corporations-a-new-formula-for-social-change (last visited Dec. 29, 2015) (suggesting that grants and sponsorships will continue to be attractive for investors based on a benefit corporation's positive public relations and furthering causes donors care about).

⁵¹ Gwen Morin, *How and Why One Company Chose to Organize As a 'B Corp'*, ENTREPRENEUR (July 26, 2011), <http://www.entrepreneur.com/article/220025>.

traditional nonprofit.⁵² In this way, a benefit corporation could gain from differentiating itself from its more traditional counterpart—which exists solely to maximize shareholder wealth.⁵³

II. NEW YORK'S BENEFIT CORPORATIONS

A. *New York Business Corporation Laws, sections 1701-1709*

Section 1701

Section 1701(a)-(d) generally outlines the application and effect of Article 17's statutes as a whole.⁵⁴ This section denotes that these laws will apply to benefit corporations and not any other corporate entity.⁵⁵ Section 1701(d) states, "[a] provision of the certificate of incorporation or bylaws of a benefit corporation may not relax, be inconsistent with or supersede any provision of this article."⁵⁶ This provision is clear that there can be no attempt to circumvent sections 1701-1709.⁵⁷

Section 1702

This section defines the terms associated with benefit corporations, and contained within sections 1701-1709 of the New York Business Corporation laws.⁵⁸ Most notably, this section defines general and specific public benefits in New York.⁵⁹ A general public benefit is defined as "a material positive impact on society and the environment [created by the benefit corporation and operation of its business], taken as a whole, assessed against

⁵² See Shane P. Neil, *The Surprising Competitive Advantage of the B Corp* (Mar. 17, 2016), HUFFINGTON POST, http://www.huffingtonpost.com/shane-paul-neil/the-surprising-competitiv_b_9476380.html.

⁵³ See Eric Friedenwald-Fishman, *S Corps, C Corps, and B Corps, Oh My! Corporate Structure Matters*, STANFORD SOC. INNOVATIONS REVIEW (Dec. 20, 2011), https://ssir.org/articles/entry/s_corps_c_corps_and_b_corps_oh_my_corporate_structure_matters.

⁵⁴ See N.Y. BUS. CORP. LAW § 1701 (McKinney) (West 2012).

⁵⁵ See *id.*

⁵⁶ N.Y. BUS. CORP. LAW § 1701(d) (McKinney 2012).

⁵⁷ *Id.*

⁵⁸ See N.Y. BUS. CORP. LAW § 1702 (McKinney 2012).

⁵⁹ See *id.*

a third-party standard.”⁶⁰ A specific public benefit is one that meets any of the enumerated examples in the section.⁶¹ This section also defines the potential methods of attaining “third-party standard” measurement.⁶² The objective third-party standard recognizes the standard for defining, reporting, and assessing general public benefits.⁶³

Sections 1703 & 1704

These two sections outline the requirements for both forming a benefit corporation in New York, and electing to transform an existing non-benefit corporation into a benefit corporation in New York.⁶⁴ Section 1703 is simple and notes that a “benefit corporation [in New York] shall be formed in accordance with this chapter except that its certificate of incorporation *shall also* state that it is a benefit corporation.”⁶⁵

However, section 1704 is considerably more complex. For an existing non-benefit corporation to become a benefit corporation, it must change its certificate of incorporation.⁶⁶ First, the corporation must change its certificate of incorporation so that it states that the corporation is, in fact, a benefit corporation.⁶⁷ Second, this change must be adopted by at least the minimum status vote.⁶⁸ In this context, a “minimum status vote” means that three-quarters of the shareholders with voting rights must approve it.⁶⁹

In addition, any non-benefit corporation that is a party to a merger or consolidation, and looking to become a benefit corporation, must approve the merger plan by at least the

⁶⁰ N.Y. BUS. CORP. LAW § 1702(b) (McKinney 2012).

⁶¹ See N.Y. BUS. CORP. LAW § 1702(e)(1)-(7) (McKinney 2012) (listing examples such as: preserving the environment, improving human health, and promoting the arts).

⁶² See N.Y. BUS. CORP. LAW § 1702(b), (e), (g) (McKinney 2012).

⁶³ See N.Y. BUS. CORP. LAW § 1702(g)(1), (2) (McKinney 2012).

⁶⁴ N.Y. BUS. CORP. LAW § 1703-1704 (McKinney 2012).

⁶⁵ N.Y. BUS. CORP. LAW § 1703 (McKinney 2012) (emphasis added).

⁶⁶ See N.Y. BUS. CORP. LAW § 1704(a) (McKinney 2012).

⁶⁷ *Id.*; see also N.Y. BUS. CORP. LAW § 1709 (stating that all certificates of incorporation shall include the phrase: “This entity is a benefit corporation organized under article seventeen of the New York business corporation law.”) (McKinney 2012).

⁶⁸ *Id.*

⁶⁹ Sandra S. O’Loughlin, *Business Associations*, 63 SYRACUSE L. REV. 559, 561 (2013).

minimum status vote in addition to any other required vote.⁷⁰ A majority vote is also required for mergers in which shares of stock of such corporation will be converted into a right to receive shares of stock of a benefit corporation.⁷¹

Section 1705

This section is devoted to how a benefit corporation's status may be terminated.⁷² In New York, the first method in denouncing benefit corporation status is to simply amend its certificate of incorporation to delete the portion stating that the corporation is a benefit corporation.⁷³ In addition, benefit corporation status is terminated by any disposition of all or substantially all of the assets of the benefit corporation, unless the transaction is in the usual and regular course of business for the benefit corporation.⁷⁴

Sections 1706 and 1707

Section 1706 covers "corporate purposes."⁷⁵ Section 1707 covers the "standard of conduct for directors and officers,"⁷⁶ respectively.

Subsection (a) under section 1706 mandates that all benefit corporations shall have a purpose of creating a general public benefit.⁷⁷ An important nuance in subsection (b) is that this purpose must control over any inconsistent purpose.⁷⁸ Further, section 1706 also allows a benefit corporation to amend its certificate of incorporation to add, amend, or delete a specific public benefit as the purpose of the benefit corporation.⁷⁹

⁷⁰ See N.Y. BUS. CORP. LAW § 1704(b) (McKinney 2012) (explaining that these other required votes could be another vote required by this chapter of laws, or the corporation's certificate of incorporation and its bylaws).

⁷¹ N.Y. BUS. CORP. LAW § 1704(c) (McKinney 2012).

⁷² See N.Y. BUS. CORP. LAW § 1705 (McKinney 2012).

⁷³ N.Y. BUS. CORP. LAW § 1705(a) (McKinney 2012).

⁷⁴ N.Y. BUS. CORP. LAW § 1705(d) (listing such dispositions as a sale, lease, conveyance, exchange, transfer, or other disposition, and with any additional requisite vote) (West 2012).

⁷⁵ See N.Y. BUS. CORP. LAW § 1706 (McKinney 2012).

⁷⁶ See N.Y. BUS. CORP. LAW § 1707 (McKinney 2012).

⁷⁷ See N.Y. BUS. CORP. LAW § 1706(a) (McKinney 2012).

⁷⁸ *Id.*

⁷⁹ N.Y. BUS. CORP. LAW § 1706(d) (McKinney 2012).

Section 1707 outlines both the mandatory and permissive considerations that benefit corporations must account for in making their business decisions.⁸⁰ Notably, the directors must consider both the short-term and long-term interests of the benefit corporation.⁸¹ Directors also have the flexibility to consider several uniquely permissive considerations.⁸²

B. New York's First Benefit Corporation

In February 2012, Greyston Bakery made history by becoming the first legally recognized benefit corporation in New York.⁸³ The company made this transition, in part, because it wanted to actualize its pioneering attitude that had been present for over thirty years.⁸⁴ One of the company's fundamental values, and public benefits, is providing "open employment" to individuals regardless of educational attainment, work history, or previous social barriers.⁸⁵ The bakery also runs community service programs, along with environmental reforms.⁸⁶

III. ARGUMENT

A. NYBCL Section 1702 is Inadequate and Should be Amended

New York's lists of "specific public benefits" in section 1702(e) should be amended and enhanced to read more like Delaware's definition of "public benefit."⁸⁷ Not only is Delaware's definition clearer, Delaware has historically been heralded as a leader in corporation law.⁸⁸ Through this amendment, the New York benefit

⁸⁰ N.Y. BUS. CORP. LAW § 1707 (McKinney 2012).

⁸¹ N.Y. BUS. CORP. LAW § 1706(a)(1)(G) (McKinney 2012).

⁸² N.Y. BUS. CORP. LAW § 1706(a)(2)(A)-(B) (McKinney 2012).

⁸³ See *Leading the Way*, GREYSTON.COM, <http://greyston.com/the-bakery-open-hiring/benefit-corporation/> (last visited Jan. 8, 2016).

⁸⁴ *Id.*

⁸⁵ GREYSTON SOCIAL ENTERPRISE: ANNUAL REPORT (2014), 3, http://greyston.com/wp-content/uploads/2013/09/annual_breport_2014_expanded.pdf (last visited Jan. 8, 2016).

⁸⁶ See *id.* at 4. Greyston Bakery engages in housing programs that allotted 530 people of the local community's affordable housing in 2014. In addition, the bakery also generated \$733,200 in income for parents who could work at the bakery due to its childcare center.

⁸⁷ See DEL. CODE ANN. § 362 (West 2012).

⁸⁸ See LEWIS S. BLACK, JR., WHY DO CORPORATIONS CHOOSE DELAWARE, 1, (2007) http://corp.delaware.gov/whycorporations_web.pdf (last visited Jan. 8, 2016).

corporation statutes will gain clarity and thoroughness. Providing additional examples of what qualifies as a specific public benefit will lead to benefit corporations serving a wider variety of social and economic interests.

1. Current State of NYBCL Section 1702

Section 1702 of the NYBCL currently lists several examples of providing a specific public benefit—such as preserving the environment, improving human health, and promoting the arts.⁸⁹ While part (e) to this provision provides guidance to benefit corporations with a few examples of specific public benefits to potentially be pursued, it does not compare to the breadth of examples listed in other states' benefit corporation statutes—especially Delaware's. As a result, the list of specific public benefits in the NYBCL is barren.

2. Delaware's General Corporation Law Section 362

Delaware's provision defining the terms and standards of its benefit corporations provides a more thorough guide for its benefit corporations; this reflects its preeminent status in the field of corporation law. Here, Delaware lists the areas in which a "public benefit" may be recognized.⁹⁰ Some examples are charitable, artistic, cultural, economic, and educational benefits.⁹¹ This "public benefit" is Delaware's version of measuring what New York's statutes refer to as a "general public benefit" or a "specific public benefit."⁹² This feature of the Delaware statute affords the benefit corporation guidance to numerous areas of public benefit, and thus allows it to choose more specific public benefits on its own within those areas.⁹³

⁸⁹ See N.Y. BUS. CORP. LAW § 1702(e) (McKinney 2012).

⁹⁰ See DEL. CODE ANN. 8, § 362(b) (West 2015).

⁹¹ *Id.*

⁹² See *id.* (defining "public benefit" as a material positive effect on one or more categories...); see also N.Y. BUS. CORP. LAW § 1702(b) (defining "general public benefit" as a material positive impact on society) and (e) (listing only a few "specific public benefits").

⁹³ See DEL. CODE ANN. 8, § 362(b). This subsection lists general areas such as cultural, economic, educational in its definition of "public benefits" that benefit corporations in its state are allowed to pursue.

3. Proposed Amendment to Section 1702

New York should amend section 1702 so that it offers more thorough coverage of the business corporation landscape of the state. When first comparing the New York and Delaware statutes, it is immediately noticeable that conspicuously absent from New York's listed benefits are the fields of education and culture.⁹⁴ New York's benefit corporation statutes should dictate that pursuit of such public benefits is encouraged—especially considering the call by many for increased educational opportunities within the metropolitan areas.⁹⁵

4. Why the Proposed Amendment Will Work

Perhaps the greatest justification for the inclusion of educational and cultural benefits in the New York statutes comes from looking at the current examples in the statutes in relation to recognized benefit corporations. There is a strong correlation between the words of the statute's examples and the result of 17% of New York's benefit corporations engaged in pursuing these expressly mentioned goals.⁹⁶ For instance, section 1702 currently lists "preserving the environment" as an example of a valid specific public benefit.⁹⁷ As a result, New York currently recognizes four out of its twenty-three benefit corporations as preserving the environment.⁹⁸

In addition, the current body of New York's legally recognized benefit corporations even represents the "improving human health" specific benefit.⁹⁹ "Green Rabbits" works to create events, projects, and programs in order to connect people to regional food systems near their communities.¹⁰⁰ The organization also offers

⁹⁴ See N.Y. BUS. CORP. LAW § 1702(e).

⁹⁵ See *Cohorts of 2001 through 2011 Graduation Outcomes*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/Accountability/data/GraduationDropoutReports/default.htm> (follow "Citywide" hyperlink). The most recent report demonstrates that although drop-out rates of New York City high school students have fluctuated in recent years; in 2009, 10.6% of the potential graduate class in June of that year, or 8,370 students, had dropped out.

⁹⁶ See N.Y. BUS. CORP. LAW § 1702(e) (McKinney 2012).

⁹⁷ See N.Y. BUS. CORP. LAW § 1702(e)(3) (McKinney 2012).

⁹⁸ See Douglas E. Singer & James Day, *New York Benefit Corporations: Bringing Social Responsibility to Business*, (Mar. 2014) THE CPA JOURNAL, http://www.falconsinger.com/NewSite/Articles/Article_3_1_14_DS.pdf.

⁹⁹ See N.Y. BUS. CORP. LAW § 1702(e)(4) (West 2012).

¹⁰⁰ See GREEN RABBITS, <http://www.greenrabbits.org> (last visited Jan. 8, 2016).

complimentary one-hour introductory consultation in-person in order to effectively get the ball rolling toward accomplishing their desired benefits.¹⁰¹

Increased focus on educational opportunities in the NYBCL would open a whole new area of benefit corporations serving the state's youth. The need for this increased focus is evidenced by the fact that *none* of the twenty-three benefit corporations officially recognized in New York solely focus on education of school-aged children.¹⁰²

In addition, much of the New York City area was considered to be at the "Most Critical" level of educational need according to the most recent data within the Educational Needs Index.¹⁰³ This report is telling. School-aged children currently comprise over a quarter of New York's population.¹⁰⁴ With the increased focus on education, especially in the inner cities of the state, these benefit corporations could increase the number of young people in the state with a high school diploma.¹⁰⁵

An education-based benefit corporation could operate in much the same way as the United Way organizes its "School Tools" program.¹⁰⁶ Through this program, the United Way was able to

¹⁰¹ *Services Offered*, GREEN RABBITS, <http://www.greenrabbits.org/services-offered> (last visited Jan. 6, 2016).

¹⁰² See *Find a Benefit Corp*, BENEFIT CORP., http://benefitcorp.net/businesses/find-a-benefit-corp?field_bcorp_certified_value=&state=New%20York&title=&submit2=Go&sort_by=title&sort_order=ASC&op=Go (last visited Jan. 5, 2016) (providing links to all currently recognized benefit corporations within New York).

¹⁰³ See *ENI Calculations for New York*, EDUCATIONAL NEEDS INDEX, <http://www.educationalneedsindex.com/new-york-education.php?n=0>. The map is broken down into four levels of educational need. The red area depicted demonstrates that much of the New York City area is in most critical need for educational advances. Approximately 35% of the "Areas" of study within the city are given this designation. The green area shows that much of the remaining areas of the city are in critical need.

¹⁰⁴ See *Census QuickFacts, United States, New York*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/RH1525215/36,00> (last visited Jan. 8, 2016) (showing that children under 18 years old and younger comprise 22.9% of the state's population).

¹⁰⁵ *Statewide High School Graduation Rate Shows Continuing Gains*, NEW YORK STATE EDUCATION DEPARTMENT (Dec. 18, 2014), <http://www.nysed.gov/news/2015/statewide-high-school-graduation-rate-shows-continuing-gains>. The overall graduation rate within New York increased to 76.4% for the graduating class of 2014, from the previous year's 74.9%. *Id.*

¹⁰⁶ See *School Tools*, INLAND EMPIRE UNITED WAY, <https://ieuw.org/community-programs/school-tools> (last visited Jan. 8, 2016).

serve 3,900 students' needs in Greenville, South Carolina.¹⁰⁷ The program solicited donations to offer the students essential school supplies such as pencils, notebooks, and binders.¹⁰⁸ Furthermore, the United Way persuaded these donations by donating backpacks to all the students on its own behalf.¹⁰⁹ A benefit corporation that strives to produce similar benefits for the children of New York can bring about the same results.

Cultural awareness could also prosper from new benefit corporations being encouraged to address the issue. It is immediately noticeable to even a passer-by walking the streets of New York City that New York, in general, is home to a population of vastly different backgrounds, and is still a hub for American immigrants.¹¹⁰ These immigrants of the state long for the mutual trust within New York's natives, which only increased cultural understanding and sensitivity can bring.¹¹¹ Therefore, benefit corporations geared toward satisfying this need for cultural tolerance and understanding can meet these people's needs.

B. The Positive Impact of New York Benefit Corporations on Social Justice as Additional Justification of its Continued Support

Because of the proposed statutory amendment and the overall continued support of benefit corporation legislation in New York, there will be a materially positive impact on social justice—evidenced through societal and economic lenses.

¹⁰⁷ *United Way's School Tools Program Helps 3,900 Greenville County Students*, <http://www.unitedwaygc.org/news-school-tools-helps-3-900-students.php> (last visited Jan. 8, 2016).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Sarita Dan, *Around the World in 5 Boroughs: It's the People, not the Places*, NEW YORK NATIVES (June 3, 2013), <http://newyorknatives.com/around-the-world-in-5-boroughs-its-the-people-not-the-places/> (explaining that as many as 800 languages are spoken in New York City alone, and approximately 36% of the population of the five boroughs are foreign born).

¹¹¹ See CUNY Develops Expanded Cultural Sensitivity Program for NYPD "Streetwise: Language, Culture and Police Work in New York City," THE CITY UNIV. OF N.Y. (May 6, 1999), <http://www1.cuny.edu/mu/forum/1999/05/06/cuny-develops-expanded-cultural-sensitivity-program-for-nypd-streetwise-language-culture-and-police-work-in-new-york-city/> ("Improved cross-cultural communication engenders mutual trust, forming the basis of positive interactions," stated John Mogelescu, University Dean for Adult and Continuing Education).

1. Societal Impact

i. Fulfilling the traditional notion of corporate social responsibility

Corporate social responsibility can be defined as the economic, legal, ethical, and discretionary expectations that society has for organizations.¹¹² Nevertheless, corporate social responsibility in today's world also requires organizations to adopt a broader view of its responsibilities, which includes not only stockholders, but many other constituencies as well—including customers, employees, and the local community.¹¹³

Benefit corporation statutes are aimed at composing an organization “distinct from the standard corporate form.”¹¹⁴ In doing so, these statutes satisfy a dual mission by accomplishing not only their own objectives, but also the objectives of traditional corporate social responsibility.¹¹⁵

To be sure, continued support of benefit corporations in New York may thus lead to stimulating the employment rate.¹¹⁶ Benefit corporations account for employees' needs by considering the best interest of its workforce when making any decision.¹¹⁷ Transparency is one of the biggest features of a benefit corporation, and this value must be present between the benefit corporation and its employees.¹¹⁸ As previously mentioned, some

¹¹² See *Corporate Social Responsibility*, REFERENCE FOR BUSINESS, <http://www.referenceforbusiness.com/management/Comp-De/Corporate-Social-Responsibility.html#ixzz3EHoJujxr> (last visited Jan. 8, 2016). (“The concept of corporate social responsibility means that organizations have moral, ethical, and philanthropic responsibilities in addition to their responsibilities to earn a fair return for investors and comply with the law. A traditional view of the corporation suggests that its primary, if not sole, responsibility is to its owners, or stockholders.”)

¹¹³ *Id.*

¹¹⁴ Dana Brakman Reiser, *Benefit Corporations – A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 595 (2011).

¹¹⁵ *Id.* at 606 (“By retaining traditional business purposes and adding the requirement of pursuing general public benefit, the benefit corporation allows entities to pursue a dual mission of both profit and social good.”).

¹¹⁶ GREYSTON SOCIAL ENTERPRISE: ANNUAL REPORT (2014), 3, http://greyston.com/wp-content/uploads/2013/09/annual_breport_2014_expanded.pdf (last visited Jan. 8, 2016).

¹¹⁷ See *The New ABC's of California Corporations*, KAYE & MILLS, <http://www.kayemills.com/articles/new-abcs-of-california-corporations.html> (last visited Oct. 8, 2016).

¹¹⁸ See *The Bakery & Open Hiring, What is a Benefit Corporation?*, GRAYSTON BAKERY, <http://greyston.com/the-bakery-open-hiring/benefit-corporation/> (last visited Oct. 8, 2016).

benefit corporations also offer “open employment” to provide employment to those struggling to find an income.¹¹⁹ This is important since 64% of young people entering the workforce want to feel they are making a difference while doing their job.¹²⁰

Benefit corporations must also inherently account for the impact of their decisions on the local community.¹²¹ With New York’s many array of communities, benefit corporations can capitalize from the current trend of increased volunteerism and interest in helping the community.¹²² This current trend of volunteerism also lends itself especially well to benefit corporations operating in New York’s demographically diverse population.¹²³

ii. Benefit Corporations fostering start-ups and small business development in New York

Benefit corporations also offer an attractive path for young business people looking to form a business in New York. Overall, the nation remains at a pivotal point regarding the life and sustainability of start-up companies.¹²⁴ Across the country, start-

Benefit corporations must consider how their decisions affect their employees since transparency is the cornerstone of the benefit corporation movement.

¹¹⁹ See *The Bakery & Open Hiring, Here’s How it Works*, GRAYSTON BAKERY, <http://greyston.com/the-bakery-open-hiring/> (last visited Oct. 8, 2016).

¹²⁰ See Angelique O’Rourke, *What is a Benefit Corporation?*, BPLANS, <http://articles.bplans.com/benefit-corporation/> (last visited Oct. 8, 2016). A recent study from the Intelligence Group found that 64% of millennials (workers age 20 to mid-30s) reported that they want part of their jobs to include making a difference in the world.

¹²⁰ *Supra*, Note 7.

¹²¹ See Angus Loten, *With New Law Profits Take a Back Seat*, WALL STREET JOURNAL (Jan. 19, 2009), <http://online.wsj.com/news/articles/SB10001424052970203735304577168591470161630>.

¹²² See *The State of Volunteering in America 2014*, CORP. FOR NAT’L & CMTY. SERV., <http://2013.volunteeringinamerica.gov/infographic.cfm> (last visited Oct. 5, 2016). Studies from 2013 show that more than 1 in 4 Americans (25.4%) volunteer in ways that enhance opportunities for their neighbors and communities. As a result, 62.6 million Americans served 7.7 billion hours for an estimated value of \$173 billion in that year alone.

¹²³ See *id.* (explaining that the increasing volunteerism spans across generations); see also (showing that 27.6% of New Yorkers were 18 years-old or younger, 58% were between 18 and 64 years-old, and 14.4% were 65 and older).

¹²⁴ See Barbara Whitaker, *Small Business 101: How to Get Started*, THE N.Y. TIMES (May 2, 2007), <http://www.nytimes.com/2007/05/02/business/smallbusiness/01websb101.html>. There is a 10-12% chance that any given storefront, of the kind commonly seen on street corners, will not be there the following year, according to the Small Business Administration’s Office of Advocacy. Further, the Office of Advocacy posits that a new business has only a 50% chance of surviving the first five years after its creation. However, recent studies have also shown that these odds are not dampening the desires of budding entrepreneurs, and thus some of them will meet this untimely fate.

ups are offering fewer and fewer jobs, because of effects from the most recent recession.¹²⁵ New York is in an especially unique situation because its small business economy has grown at a slower rate than the U.S. as a country, per the most recent available data, and thus could prosper from new viable businesses.¹²⁶

Benefit corporations would stimulate the rate of startup inception with a pursuit of public benefits and their unique “Right of Action” features.¹²⁷ Entrepreneurs are likely to be enticed by the fact that there is no possibility of a third-party right of action against the company.¹²⁸ The entrepreneur would be protected from a right of action based on company activities altogether if he or she adhered to benefit corporation principles.¹²⁹ Providing extra protection to these entrepreneurs of start-ups, via the “Right of Action” feature, can give them the extra assurance needed to effectively form new companies in New York.¹³⁰ This extra protection can also overcome hesitance of entrepreneurs due to the doubtful chances of tax breaks becoming available for benefit corporations.

2. Economic Impact

The continued support of benefit corporations, and the amendment of their statutes in New York would also have a considerable positive economic impact on the state. Some have

¹²⁵ See *Small Business Facts*, SBA OFFICE OF ADVOCACY, <http://www.sba.gov/sites/default/files/Startup%20Rates.pdf> (last visited Oct. 5, 2016). Employment at startups is only about 45% of the peak figure, according to the most recent available data. This means that these startups are smaller than the ones that were formed in the late 1990's. In turn, this means that fewer new jobs created by startups.

¹²⁶ See *Small Business Profile New York*, SBA OFFICE OF ADVOCACY, <https://www.sba.gov/sites/default/files/advocacy/NY.pdf> (last visited Oct. 5, 2016). New York's real gross state product increased by 0.7 percent, while U.S. gross domestic product grew by 2.2 percent.

¹²⁷ Frequently Asked Questions, *What is a Benefit Corporation?*, BENEFIT CORP., <http://benefitcorp.net/faq> (last visited Oct. 5, 2016).

¹²⁸ *Id.*

¹²⁹ See Wikipedia, *Benefit Corporation*, https://en.wikipedia.org/wiki/Benefit_corporation (last visited Oct. 7, 2016, 4:00 EST) (“A right of action can be for: 1) violation of or failure to pursue or create general or specific public benefit; 2) violation of a duty or standard of conduct”).

¹³⁰ See Lewis Howes, *Keys to Success: Overcoming 5 Fears That Hold Entrepreneurs Back*, ENTREPRENEUR (Aug. 19, 2013), <http://www.entrepreneur.com/article/227842> (listing “Fear No. 1: [as] Not believing in yourself”).

heralded benefit corporations as one of the most important developments in the business sector in decades, due to the shift in the public's collective consciousness about business.¹³¹

First, the positive impact is likely to come from the general mandate in NYBCL's benefit corporation statutes.¹³² NYBCL section 1702's mandate prompts current and potential benefit corporations to be mindful of the possible goals to be obtained through this type of mission.¹³³ Second, this provision also surpasses the broad proposal of job creation because the specific public benefit definition dictates that individuals and the community must economically benefit *beyond* the creation of jobs.¹³⁴

Benefit corporations also satisfy economic responsibilities to customers. There is a documented, systemic response from consumers that demonstrates their admiration and patronage of companies with a strong social mission.¹³⁵ Consumers are increasingly associating their purchases with their values, and buying accordingly.¹³⁶ Benefit corporations offer a viable method of fulfilling traditional responsibilities to such customers in catering to their prevailing values and buying patterns in today's world.¹³⁷ Thus, in New York's ever-prevalent consumer market, continued support of benefit corporations would lead to the increase of consumption based on the recent trend of socially conscious purchasing.

¹³¹ John Montgomery, *The Benefit Corporation, The Unlikely Hero of a Sustainable Economy*, THEHUMANIST.COM (Apr. 22, 2014), <http://thehumanist.com/magazine/may-june-2014/features/the-benefit-corporation> (suggesting that the benefit corporation is the most important development in the field of business law since the advent of free incorporation and limited liability in 1811 partly because of the increased focus on corporate social responsibility).

¹³² N.Y. BUS. CORP. LAW § 1702(e)(2) (McKinney 2012) (stating that one recognized specific public benefit in New York is the promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ ¹³⁵ Davis Smith, *Before Incorporating a Social Mission, Consider These 5 Things*, ENTREPRENEUR (Sept. 10, 2014), <http://www.entrepreneur.com/article/237260>.

¹³⁶ Doug Bend & Alex King, *Why Consider a Benefit Corporation?* FORBES, <http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation> (commenting on the "all-time high" for the demand by consumers for corporate accountability).

¹³⁷ *Id.*

3. The Societal Impact of Benefit Corporations is the Strongest Policy Justification

Corporate social responsibility has been a staple and expectation of corporations for decades. The facilitation of benefit corporations could bolster the increase of more corporate social responsibility initiatives in the future. Thus, the social benefit is the benefit corporation's strongest feature. Since New York has such a unique demographic landscape,¹³⁸ the social implications of benefit corporation statutes will likely yield impactful results. With corporations expected to manage their initiatives to maximize shareholder profitability to some degree regardless of new legislation, the social feature of benefit corporations should be the driving force behind its continued support for the amendment in New York, since they better serve the varying age and educational demographics of the state.

While consumers are likely to benefit from the satisfaction of purchasing from an innovative and socially conscious company, benefit corporations offer a dual mission for the directors to accomplish not only benefit corporation goals, but also the goals of the traditional model of corporate responsibility.¹³⁹ The social policy behind benefit corporations is also the strongest justification behind their continued support in New York based on the ever-present pursuit by companies to retain the public's trust.¹⁴⁰ Benefit corporations serve the need for public trust in companies.¹⁴¹

CONCLUSION

The introduction of benefit corporation statutes into the unique socio-economic landscape of New York has brought about the potential for vast innovations in New York's overall corporate structure. First, amending section 1702(e) of the NYBCL to

¹³⁸ See *ENI Calculations for New York* *supra* note 104.

¹³⁹ See *REFERENCE FOR BUSINESS*, *supra* note 113.

¹⁴⁰ See *Special Report: The Dynamics of Public Trust in Business – Emerging Opportunities for Leaders*, BUS. ROUNDTABLE INST. FOR CORPORATE ETHICS, 15 (2009), http://www.corporate-ethics.org/pdf/public_trust_in_business.pdf. This survey shows that almost one-fifth (18%) of the CEO's surveyed responded that "regaining the public trust" was the most important corporate ethics issue facing businesses today. *Id.*

¹⁴¹ See *id.* at 35 (describing the high correlation between high-trust societies, or businesses, and economic prosperity).

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include these proposed amendments will lead to increased awareness and clarity in pursuit of benefits involving the education of school-aged children and the promotion of cultural sensitivity — due to the express mention of these benefits within the statute. Second, social and economic policies justify the continued support of benefit corporations. In sum, the enhanced support of benefit corporations in New York will lead to more entrepreneurial ventures that better serve the state's unique socio-economic landscape.